Date: December 13, 1994

Case No: 92-ERA-52

Richard G. Smith
COMPLAINANT

against

Richard L. Littenberg, MD and
Honolulu Medical Group
RESPONDENTS

Appearances:

Michael A. Lilly, Esq.
For Complainant

Robert S. Katz, Esq.
Richard M. Rand, Esq.
For the Respondents

Before: **DAVID W. DI NARDI**
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This case arises under the Energy Reorganization Act of 1974 as amended, 42 U.S.C. § 5851 ("Act" or "ERA"), and the implementing regulations found in 29 C.F.R. Part 24, whereby employees of licensees or applicants for a license of the Nuclear Regulatory Commission and their contractors and subcontractors may file complaints and receive certain redress upon a showing of being subjected to discriminatory action for engaging in a protected activity. The undersigned conducted hearings in Honolulu, Hawaii, on June 29 and 30, 1994, at which time the parties were given the

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opportunity to present oral arguments, their witnesses, and documentary evidence.[1]

Procedural History

On May 22, 1992, Richard G. Smith (or "Complainant" herein)

was discharged from Honolulu Medical group (HMG) by Respondent Dr. Richard L. Littenberg. Thereafter on June 15, 1992, Smith filed a complaint under the ERA with the Department of Labor, and the complaint was investigated under the regulations contained in 29 C.F.R. Part 24.

After the completion of the investigation, and pursuant to the regulations, on August 14, 1992, the District Director, the Employment Standards Administration advised the parties that "the weight of evidence to date indicates that Smith was a protected employee engaging in a protected activity within the scope of the ERA and that discrimination was a factor in the actions which comprise this complaint." That finding ordered HMG to reinstate Smith and to pay Smith back wages in the amount of $6,240.00. (CX 12)

HMG, believing that only it as the Respondent, and not Smith as the prevailing party, had a right to request a hearing, decided not to contest the District Director's determination and did not request a hearing.

However, Smith, by telegram dated August 22, 1992, requested a hearing. On August 26, 1992, HMG sent a telegram objecting to Smith's request for a hearing on the grounds that the regulations provided that where a violation was found only the Respondent could request the hearing.

After Administrative Law Judge ("ALJ") Robert T. Mahony issued a Recommended Decision and Order Granting Respondents' Motion to Dismiss on June 30, 1993, the Secretary of Labor, after reviewing the record, issued a Decision and Remand Order ("Remand Order") wherein the Secretary concluded that Smith did have the right to request a hearing and remanded the matter to the Office of Administrative Law Judges to conduct a hearing "limited to the issue of the remedies to which Complainant is entitled under the ERA." The Secretary's mandate prohibits Respondents from litigating the issues of liability as the Secretary has concluded that Respondents had waived their right to contest liability.

Respondents have properly preserved their right to challenge the Remand Order and the Secretary's mandate in any appropriate

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forum and have not waived any rights by participating in this proceeding.

Pursuant to the Secretary's Remand Order, a hearing was held before the undersigned and the scope of the hearing was limited to the issue of the remedies available to the Complainant, in accordance with the Secretary's mandate.

Smith presented testimony from himself, Terry Ichinose, Scott Dube, April Ferrer, Dr. Littenberg and David Tajima. Respondents cross-examined all the witnesses and both sides were given the opportunity to present testimony and documentary evidence.

At the commencement of the hearing, Smith waived any claim for

backpay for the period after August 1, 1993. In addition, Smith agreed that HMG would be entitled to offset, against any backpay award for the period prior to August 1, 1993, the amounts he had received in workers' compensation indemnity benefits from HMG's insurance carrier. Those amounts are set forth in RX 1 and totalled $26,969.15. Smith argues that he is entitled to the difference in the salary he would have received from HMG and the amount of his workers' compensation benefits, whereas HMG contends that because Smith was disabled prior to his discharge for reasons unrelated to his discharge, he is not entitled to any back wage award whatsoever.

As discussed further below, Complainant injured his back on May 15, 1992 while lifting a patient. Smith testified that as a result of this injury he became disabled from working and could not work at HMG commencing on his next regularly scheduled day of work, May 18, 1992. Smith has stipulated with the State of Hawaii that he was disabled from May 21, 1992 through July 26, 1993. Neither party challenges Smith's disability.

Post-hearing evidence has been admitted as follows:

EXHIBIT NO	ITEM	FILING DATE
CX 27	Complainant's brief	9/29/94
RX 7	Respondents' brief	9/29/94
RX 8	Respondents' reply brief on the issue of compensatory damages	10/12/94

The record was closed on October 12, 1994 as no further documents were filed.

SUMMARY OF THE EVIDENCE
COMPLAINANT'S VERSION

Complainant alleges that he was engaged in protected activity,

that the Respondents knew of this fact and that, nevertheless, he was still terminated by the Respondents in a discriminatory discharge. Complainant had sustained a work-related injury on May 15, 1992, a Friday, was unable to work on the following Monday, May 18th and he so advised Respondents' office early on that morning. He was unable to work the next day and timely notified the office of his absence. The radionuclide scanning of patients resumed the next day and Complainant, having learned that unqualified substitute personnel, were participating in those tests, wrote a letter about those procedures and in that letter he was critical about HMG and Dr. Richard L. Littenberg, especially the doctor's attitude toward him. The doctor reacted strongly to the letter and terminated Complainant because he had abandoned his job and because of his inability to get along with his co-workers.

Complainant seeks an award of back pay from May 22, 1992, the date of his termination, to August 1, 1993, at which time he found work at the Castle Medical Center in Honolulu. Complainant also seeks an order directing Respondents to expunge negative references in his personnel file and to advise the NRC and other entities of incorrect statements made in certain letters and other documents. He also seeks an award of medical benefits for the psychiatric treatment for his depression and emotional distress resulting from his discriminatory discharge. He also seeks reinstatement with Respondents and he believes that he will be able to work with Dr. Littenberg and other personnel at HMG.

As already indicated above, Complainant seeks compensatory damages for the depression and emotional stress caused by his discriminatory discharge by the Respondents and he alleges that such damages should be calculated based upon the Hawaii state minimum wage rate of $5.25 per hour for twenty-four hours each day

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from May 22, 1992, the date of his illegal termination, to June 29, 1994, the day of his hearing before this Administrative Law Judge, **i.e.**, $5.25 x 24 x 768 days or $96,768.00.

RESPONDENTS' VERSION

Respondents submit that this complaint should be denied because Complainant's disability status necessitated his termination by HMG because he was unable to work at HMG or anywhere else, irrespective of whether he had been terminated on May 21, 1992, and because there is no causal relationship between his disability and Respondents' termination of Complainant. However, that termination has already been found to violate the ERA, and that finding is binding upon the parties at the Office of Administrative Law Judges.

Respondents further point out that, on or about August 1, 1993, Smith began working for Castle Medical Center replacing another employee who was on maternity leave. Smith has been continuously employed since that time, although not always in a full time capacity. Smith has been able to work since that time and he would not have earned any compensation from HMG for the period May 15, 1992 through July 27, 1993, regardless of his

discharge from HMG, because he was out on disability. Smith did not present any evidence that would allow this Administrative Law Judge to attribute his May 15, 1992 injury to any improper actions by HMG, according to Respondents.

After his discharge from HMG, Smith was examined on August 20, 1992, by Dr. Robert Marvit and, on September 22, 1992, by Dr. Mark Stitham. Dr. Marvit recommended psychiatric treatment to cope with his psychological symptoms. However, Dr. Stitham opined that Smith was not in need of psychiatric treatment and opined that he was not disabled from working. Smith presented no testimony or evidence that he has received or sought psychiatric treatment after Dr. Stitham's November 6, 1992 opinion. There is no evidence in this record that Smith has voluntarily obtained psychiatric treatment since his discharge from HMG. Despite the lack of psychiatric intervention, Smith returned to work as soon as he was physically able to do so.

On April 20, 1994, Smith was re-examined by Dr. Marvit, apparently for the purposes of this proceeding, as the doctor had not seen Smith since his August 1992 examination. At the hearing, Smith testified that he has been suffering from potentially life-threatening illness. However, that diagnosis is not reflected in Dr. Marvit's August 1992 report or his April 1994 report.

The doctors agreed that Smith was having trouble adjusting to his inability to work or to participate in many recreational sporting events, as he formerly did; however, the reason therefor is in dispute.

Respondents also submit that during the course of his employment, Smith had numerous disagreements with Littenberg about pay and Smith's interaction with other employees of HMG. Respondents point to documents in evidence which show that Littenberg constantly had to admonish Smith about his interaction with other employees. Ms. April Ferrer, called as a witness by Smith, admitted that Smith's reputation for having difficulties in working harmoniously with other employees was well known throughout HMG, according to Respondents.

When Smith was hired, there was more demand for nuclear medicine technologists than supply. Accordingly, a certified technologist such as Smith could demand a premium and could dictate his/her working conditions. When Smith was originally hired by HMG, he was administratively supervised by the Director of Nursing. All non-physician staff of HMG are administratively, as distinguished from clinically, supervised by either the Director of Nursing or the Administration Department. Littenberg changed that relationship when Smith vehemently protested being supervised at all by the Director of Nursing and threatened to quit. That change reflected HMG's need to retain Smith and is not an admission that the Director of Nursing was administratively unqualified to supervise Smith.

Respondents point to a meeting on May 11, 1992, at which time Littenberg and Smith met to discuss Smith's request for a pay raise. During that conversation, Littenberg counseled Smith about his interaction with other employees, warning him that he was adversarial and short-tempered. Smith responded by blaming any problems on other employees. Littenberg warned Smith that he needed to improve his interaction with other employees or face disciplinary action, according to Respondents.

As a result of these problems with Smith, HMG had been actively seeking to hire a nuclear medicine technologist. Sandra Monzingo, who was ultimately hired for the position, had applied pursuant to an advertisement in the local newspaper by letter dated May 7, 1992.

David Tajima had been hired by HMG in September of 1991, to assist Smith and Littenberg contemplated that he would be trained

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to perform many of Smith's duties, except those which by regulation may not be performed by Tajima. Specifically, Tajima would not inject patients with the radioactive isotopes and would not interpret the scans taken because that function was performed only by Littenberg. Tajima, however, could and was trained to perform the weekly "wipe" of the machine to make sure that there were no radioactive materials present, could measure the radioactive isotopes which had been received in the pharmacy and could do other functions as taught to him by Smith. Respondents submit that the testimony of Littenberg, Tajima and Radiation Safety Officer ("RSO") Scott Dube, leads to the conclusion that when Tajima was hired it was contemplated that he would function as Smith's assistant and would perform many of Smith's functions when Smith was unavailable for work.

Prior to May 1992, Tajima had been taught to do the wipe, certain calibrations and other tasks which Smith also performed. Tajima was never taught and was never asked to inject patients with the isotopes.

Smith did not report for work on May 18, 1992 and Respondents submit that it is undisputed that he did not speak to Littenberg on that date. However, Smith unilaterally telephoned the pharmacy and stopped the shipment of radioactive isotopes. As a result, no scans were performed.

Smith also did not report for work on Tuesday, May 19, 1992, and again Smith called the pharmacy to prevent any isotopes from being shipped to HMG, and HMG was precluded from conducting any scans that day. Smith testified that he spoke to Littenberg late in the afternoon on Tuesday, May 19, 1992, at which time Littenberg informed him that the scans would resume the next day. Littenberg has denied this testimony.

Littenberg testified that he did not speak to Smith until May 20, Wednesday, after Littenberg had resumed performing scans with the assistance of Tajima and Terry Ichinose, whom Littenberg asked to come to HMG and help Tajima perform the "flood", a safety test

used to make sure that the camera is imaging properly.

Respondents further point out that, significantly, Smith's May 21, 1992 letter, which he claims was written on May 20, 1992, does not refer to the alleged conversation between him and Littenberg and that he would have had his letter delivered on May 20, 1992, if indeed he knew on May 19, 1992 that scans were going to be performed on May 20, 1992.

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On May 20, 1992 and thereafter HMG resumed taking scans using the services of Littenberg and Tajima. Respondents point out that the NRC has conducted a full investigation of Smith's complaints and found no violations of its regulations or applicable statutes in the conduct of HMG, Littenberg and Tajima on May 20, 1992 and thereafter.

In early June 1992, HMG hired Sandra Monzingo on a full time basis to be Smith's replacement. Monzingo was administratively supervised by the Director of Nursing. She was clinically supervised by Littenberg because under NRC regulations there are certain tasks that Littenberg, as the license holder, cannot delegate to other persons. In addition, Monzingo has been required to perform additional duties from time to time because the volume of scans performed in the nuclear medicine department has dropped as other diagnostic tests such as CAT scans and MRIs have become more widely used.

Respondents submit that this complaint should be denied for the further reason that, on February 18, 1994, Respondents' counsel delivered to Smith's counsel an unconditional offer of reinstatement offering Smith his former position as a nuclear medical technician, effective March 7, 1994. In that letter, Respondents offered to reinstate Smith, without prejudice to these proceedings or to any other proceedings, at his former rate of pay with all benefits. The letter did inform Smith that he would be supervised to some extent by the Director of Nursing "who now supervised nuclear medicine technicians." Smith was also informed that his schedule would be changed from Monday through Friday to Monday through Saturday with half days on Thursday and Saturday mornings. In the letter, HMG's counsel invited Smith's counsel to advise his if there were any questions.

At the time Smith received HMG's offer, he knew certain supervisory tasks were non-delegable and would still be performed by Littenberg. In addition, Smith testified that the Director of Nursing could administratively supervise him, **e.g.**, keep track of his vacation, and other administerial tasks without implicating any safety concerns. Smith testified at the hearing that he really did not object to working Saturday mornings, and that this aspect would have been negotiable.

On March 3, 1994, Smith's counsel advised HMG's counsel that Smith had rejected the offer of reinstatement. No reasons were given.

The parties stipulated that Smith, in the period between

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February 18, 1994 and March 3, 1994, could have ascertained, through HMG's counsel, as to the extent of the supervision by the Director of Nursing and could have clarified any other questions he had about HMG's offer. Smith testified that he only had two objections: any supervision by the Director of Nursing and working half days on Saturdays.

Respondents submit that the changes in Smith's working conditions set forth in HMG's unconditional offer of reinstatement did not substantially alter Smith's terms and conditions of employment and that, viewed objectively, Smith's reasons for rejecting HMG's offer were personal. HMG's offer constituted a **bona fide** offer of reinstatement to Smith's former position or to a comparable position since his former position had slightly changed and now involved administrative supervision by the Director of Nursing. The administrative supervision by the Director of Nursing would not have implicated any safety concerns. A reasonable person would have accepted HMG's February 18, 1994 reinstatement offer.

Smith knew, or should have known, that if he rejected HMG's offer of reinstatement for personal reasons, that he was waiving his claim to reinstatement under the ERA. HMG's letter referred to the United States Supreme Court decision in **Ford Motor Company v. EEOC**, 458 U.S. 219 (1982). Smith was on notice that HMG was attempting to mitigate its damages. At the time, HMG made its offer, it did not know that Smith would not be seeking backpay for the period after August 1, 1993.

Respondents point out that at the hearing, Smith was lucid and articulate, and able to respond to questions. Smith did not exhibit any signs of emotional distress or residual strain. Smith testified that he has been seeking work albeit through informal means.

SCOPE OF HEARING

The Secretary, on pages 8 and 9 of his **Decision And Remand Order**, concludes as follows:

> "Although the District Director found in this case that Respondent violated the ERA, he did not order Respondent to reinstate Complainant to his former position, as the employee protection provision provides. Regulations implementing the ERA should be read to give full redress for a violation of the employee protection provision. Under such a reading, a Complainant who

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> prevails but neither receives the benefits of, nor waives, reinstatement is entitled to a hearing to establish his right to reinstatement.

"Based on a fair reading of the regulation in congruence with the statutory language and intent, I grant Complainant's request for a de novo hearing. Accordingly, I remand this complaint to the ALJ for a hearing limited to the issue of the remedies to which Complainant is entitled under the ERA.[2] I note that under the statute and upon request, Complainant is entitled to "all costs and expenses (including attorneys' and expert witness fees) reasonably incurred . . . in connection with, the bringing of the complaint . . . ," and may be entitled to compensatory damages. 42 U.S.C. § 5851(b)(2)(B)."

On the basis of the totality of this closed record and having observed the demeanor and having heard the testimony of the witnesses, including a credible Complainant, I make the following:

FINDINGS OF FACT

The employee protection provision of the Act provides that:

(a) **Discrimination against employee**. (1) No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or person acting pursuant to a request of the employee)

(A) notified his employer of an alleged violation of the Act . . .;
(B) refused to engage in any practice made unlawful by this Act . . . if the employee has identified the alleged illegality to the employer;
(C) testified before Congress or at any Federal or State proceeding regarding any provision (or proposed provision) of this Act . . .;
(D) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this Act . . . or a proceeding for the administration or enforcement of any requirement imposed under

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this Act . . .;
(E) testified or is about to testify in any such proceeding or;
(F) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this Act . . . .

42 U.S.C.S. § 5851 (Supp. May, 1993).

The Complainant has the burden of establishing a **prima facie** case of discrimination under the ERA. The complainant must show, by a preponderance of the evidence, that he engaged in protected activity, that he was subjected to adverse action and that the Respondent was aware of the protected activity when it took the adverse action against the complainant. In addition, the Complainant must produce evidence sufficient to at least raise an inference that the protected activity was the likely motive for the adverse action. **See Dartey v. Zack Co. of Chicago**, Case No. 82-ERA-2, Sec. Dec., Apr. 25, 1983, slip op. at 7-9. If the Complainant satisfies his burden of presenting a *prima facie* case, the burden of production shifts to the Respondent to produce clear and convincing evidence that the adverse action was taken for legitimate, non-discriminatory reasons. **See** Dartey at 8.

Courts and the Secretary of Labor have broadly construed the range of employee conduct which is protected by the employee protection provisions contained in environmental and nuclear acts. **See** S. KOHN, THE WHISTLEBLOWER LITIGATION HANDBOOK 35-47 (1990). Examples of the types of employee conduct which the Secretary of Labor has held to be protected include: making internal complaints to management,[3] reporting alleged violations to governmental authorities such as the Nuclear Regulatory Commission ("NRC") and the Environmental Protection Agency, threatening or stating an intention to report alleged violations to such governmental authorities, and contacting the media, trade unions, and citizen intervenor groups about alleged violations. **Id.**

1. Richard G. Smith ("Smith" or "Complainant") was during his employment with Honolulu Medical Group ("HMG" or "Respondent") an employee covered by the provisions of the Energy Reorganization Act ("ERA"), 42 U.S.C. §5851.

2. HMG is an employer under the ERA, 42 U.S.C. §5851, engaged in the business of operating a medical facility which uses radioactive isotopes licensed and regulated by the Nuclear

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Regulatory Commission ("NRC").

3. Respondent Richard L. Littenberg, M.D. ("Littenberg") is the holder of the license from the NRC.

4. Complainant, a trained and experienced radionuclide medical technologist, became certified and registered in Nuclear Medicine Technology by the American Registry of Radiological Technologists in May of 1976. In June of 1976, Complainant accepted a job with Kuakini Hospital in Honolulu, Hawaii, as a radionuclide medical technologist and later served as the Hospital's Acting Chief of the Nuclear Medicine Department. (TR at 53, 55)

5. Thereafter, Smith was hired as a nuclear medicine technologist by Queens Medical Center ("Queens") where he met and became friends with Dr. Richard L. Littenberg ("Littenberg" or "Respondent"). In 1979, Littenberg hired Smith to work at

"Littenberg Mobile Medical," a portable nuclear medical company which serviced major medical hospital intensive care patients in Honolulu. Smith worked for Littenberg's company for two years before it was closed when the portable business was no longer profitable. (TR at 57)

6. In 1981, Smith worked in a private nuclear medicine technology clinic and, the next year, returned to Queens where he served as a Nuclear Medicine Technologist and started doing "monoclonal antibody research." (TR at 59)

7. On July 14, 1986, Littenberg hired Smith to work at Honolulu Medical Group ("HMG") as HMG's Chief of nuclear Medical technology and only radionuclide technologist. Smith's primary jobs at HMG were doing diagnostic imaging, radiation safety, coordinating radio isotopes, calibrating equipment, operating the dose calibrater, well counter and gamma camera, maintaining HMG's compliance with Nuclear Regulatory Commission ("NRC") guidelines and handling patient scheduling. The dose calibrater, well counter and gamma camera are complex equipment which use and/or register radio-isotopes to perform a variety of functions. The dose calibrater uses cesium 137 to check the range of isotopes used on patients. The well counter is used for safety reasons to determine if a radioactive spill has occurred. The gamma camera images radio-isotopes injected in a patient to diagnose disease, such as cancers. (TR 61-63, 70-72)

8. Smith was hired with the understanding he would not be supervised by anyone at HMG other than Littenberg. On January 26, 1987, Smith was given his first evaluation by HMG's Director of

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Nursing. Smith protested on the evaluation form that this evaluation was contrary to his agreement with Littenberg:

> I was informed and promised I would be under the direct supervision of Dr. Littenberg ONLY! The Director of Nursing is NOT TO EVALUATE ME. If it occurs again, this will be a direct violation of employment agreement.

(Exhibit 1 at E-168) Smith and Littenberg had entered into an agreement before Smith began working at HMG in 1986 that he would not be supervised by the Director of Nursing. Thereafter, Smith was only evaluated by Littenberg. (TR 100, 101, 349)

9. In September 1991, David Tajima ("Tajima") applied for a clerk position. Littenberg and Smith had previously discussed Smith's need for clerical help. Littenberg hired Tajima to help Smith with his paperwork. Tajima started doing clerical work for Smith. Smith taught Tajima how to operate a geiger counter, a device which was easy to operate. Littenberg wanted Smith to teach Tajima his job. However, Smith refused to teach Tajima his job, including the calibration of equipment, because of his concerns for patient safety, because Tajima was not licensed and because Smith had spent his own time and funds to become trained in the nuclear medical technology field. (TR at 66, 67 and 68) Littenberg never

gave Smith a direct order to teach Tajima his job and Smith did not teach Tajima how to calibrate nuclear medicine equipment. (TR 64-69)

10. Although a job description was developed for Tajima (Exhibit 26), Smith did not participate in its development. (TR at 69-70). The first time Smith saw Exhibit 26 was in "June of 1992 at the Federal Building at the Department of Labor" after he was fired from HMG. (TR at 69 and 98). Yet, Littenberg misinformed the NRC that Smith had participated in developing the job description. (Exhibit 3 at E-159).

11. There was no formal nuclear medical training program at HMG. Such a program would have entailed requirements similar to the ones implemented at Queens, a program which included: 1) a correspondence course with a mainland university; 2) several years work on the job; and 3) passing the national nuclear registry test. (**See** Testimony of Terry Ichinose, TR at 43-6) Queens was the first hospital in Hawaii to start such a training program and HMG did not have such a program. (TR at 47)

12. Tajima was not qualified for his own job description as

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he had not completed a medical assistant program (TR at 303) or one year of direct patient care (TR at 303-04), as required by the job description. He also had not completed any formal training or any of the other requirements established at Queens. (TR at 304)

13. Smith's personnel record (Exhibit 1) demonstrates, and Smith's testimony confirms, that during his employment at HMG Smith took very little time off for vacations or sick leave. (TR at 73-4) His personnel file shows the following:

1986: He took no sick days. Exhibit 1 at E-166.

1987: His attendance record was "always regular." *Id.* at E-170.

1988: He took two sick days and no vacation time. *Id.* at E-19. His July 8, 1988 evaluation noted his attendance was "always regular." *Id.* at E-174.

1989: He took no sick days, three days leave without pay and 14 days vacation. *Id.* at E-24.

1990: He took three sick days, five days vacation and 13 days at a nuclear medical conference.

1991: He took four sick days and four days vacation. *Id.* at E-70.

1992: He took 1/2 day vacation and three days workers compensation. *Id.* at E-73.

In his five years with HMG, Smith took only 9 sick days, 23.5 vacation days, three days workers' compensation and 13 days to attend a professional meeting. He was entitled to up to 20 vacation days a year. Smith was unable to take all his vacation time because of "the increasing shortage of nuclear medicine technologist and increasing work load." (Exhibit 1 at E-65)

14. Accordingly, HMG regularly paid Smith for his unused vacation time. For example, on October 21, 1988, Littenberg authorized Smith to be paid for 10 accrued vacation days. (**Id.** at E-20) A March 7, 1991 memo in Smith's personnel file also confirmed this arrangement. (**Id.** at E-63) His personnel file reveals he was paid for 80 hours vacation in October, 1988, 72 hours in December, 1988, 120 hours in 1989, 56 hours in April, 1990, and 80 hours in March, 1992. (**Id.** at E-35-6) In May, 1992,

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just prior to his termination, Littenberg audited Smith's vacation time and determined that he had accrued 160 hours (20 days) vacation (**Id.** at E-34)

15. On Friday, May 15, 1992, Smith suffered a work related injury while lifting a heavy patient. He felt a "pulling sensation," but did not think much of it at that time and he continued to work. However, later, the back pain became more "intense." (TR at 75)

16. On Monday, May 18, 1992, at 8:05 a.m., Smith called April Ferrer ("Ferrer"), Littenberg's nurse, and told her that he was unable to work because he had injured his back lifting a patient. (TR at 75-6, 204) According to Ferrer's recorded statement, "Whenever he [Smith] called in sick, he called me up and I let the doctor know." (Exhibit 1 at E-141) Smith testified that that was the normal procedure. (TR at 76) He had never been instructed or ordered to call Littenberg when he was sick. (TR at 76 and 94-5) Smith also "usually" called Tajima when he was not going to be in and, during the week of May 18, Smith called him every day. (TR at 323) Tajima told Littenberg that Smith was sick. (TR at 324) Ferrer's recorded statement to the insurance carrier confirmed she told Littenberg that Smith was out sick on May 18. (**Id.** at E-141) She also testified:

> Q. ... I'm going to ask if you recall that there was an occasion which Rick Smith called you up to inform you that he -- he had had an injury.
>
> A. Yes.
>
> Q. Okay. What did he say to you?
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> A. He called me and said he will not be in to work today 'cause yesterday he injured his back.

Q. Okay. And what did you do?

A. I took the message.

Q. Yeah.

A. And I related to Dr. Littenberg when he called in.

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(TR at 204) Smith's call was made the first day he was out. (TR at 205) Littenberg called in a note to the personnel department that "Rick Smith [was] out sick today -- to make a note." (**Id.** at E-96) Littenberg admitted he called in the note:

Q. You told the people upstairs on the 18th that Rick Smith was out sick, was that what you were saying?

A. Yeah.

(TR at 242)

Q. Well, you could have just said, Rick's -- Rick's not here. Why did you have to say he's out sick?

A. I don't know why.

(TR at 242-43) Littenberg's recorded statement also admits Ferrer told him on May 18 that Smith had called in sick:

Q. ... May 18th, yes. He spoke to April on the telephone, that's what he alleged.

A. He called in sick, "cause he obviously wasn't here ... I asked where was Rick and I was told he had called in, and he knows the hours that I'm here, and he get called in well, prior to my arriving and claimed that he was out sick ...

(Exhibit 11 at #-240) Dr. Littenberg has denied that he was told that Smith was sick that day.

17. Pursuant to standing operating procedure, Smith informed the Pacific Radio Pharmacy not to deliver the radio-isotopes to HMG that day and he also made an appointment to see Dr. Peter Diamond, an HMG orthopaedic specialist, on May 19, 1992. (TR at 76)

18. On Tuesday, May 19, 1992, Smith called Ferrer again to tell her that he would remain out of the office. (TR at 77) Complainant's personnel file contains a note that "he's filing

(for) W.C." (worker's compensation). (Exhibit 1 at E-96) Smith also told Tajima the same thing. Littenberg testified he learned that morning from Ferrer that Smith was still out sick. (TR at 216) Smith saw Dr. Diamond who examined him and diagnosed cervical

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spasms. Dr. Diamond told Smith to return Thursday, May 21, 1992. Smith later called Littenberg to inform him what Dr. Diamond had told him. Littenberg was "furious" because Smith was not there and because Smith had stopped the radio-isotopes from being delivered to HMG. Smith told Littenberg there was no reason for the radio-isotopes to be delivered because there was no qualified technician to handle them. Littenberg said that he would use Tajima and do what he pleased. Smith felt that was a mistake and not the proper procedure because Tajima did not know how to calibrate the equipment and perform the other necessary tasks. The conversation ended with Littenberg telling Smith not to worry about being ill and to come in on Thursday. (TR 77-79)

19. On Wednesday, May 20, 1992, Smith called HMG at 8:05 a.m. and spoke to Tajima who advised him (Smith) that Littenberg was having him do radionuclide scanning on patients. Tajima advised Complainant that the radio-isotopes had been delivered and Terry Ichinose, a radionuclide technician at Queens, would shortly be there to calibrate the equipment. Smith thought that was a mistake because of his concerns for safety of the patients. Smith wrote a letter to Littenberg, with copies to the HMG radiation safety committee, complaining that Respondents were permitting unqualified persons to perform Radionuclide Scanning examinations of patients. However, the letter, Exhibit 8, was not mailed until the next day. (TR 80-81)

20. On Thursday, May 21, 1992, at 8:05 a.m., Smith called Ferrer or Tajima to report he was still out due to illness. He saw Dr. Diamond that morning and the doctor advised him to remain out until Monday. Smith mailed Exhibit 8. (TR 81)

21. On Friday, May 22, 1992, Smith had a message to call Littenberg. Smith called Littenberg who informed him he was terminated and to pick up his letter of termination and pay that day. Littenberg said he was terminated because of the letter he had written. (Exhibit 8) Littenberg was "upset" because Smith had "embarrassed him." Littenberg testified he "went ballistic" after receiving the letter. (TR at 218) Smith asked if they could discuss the matter, to which Littenberg replied, "No." (TR at 84) Smith picked up his letter of termination. (Exhibit 10) This letter clearly stated Smith was terminated because of Exhibit 8. On August 5, 1994, Littenberg caused his attorneys to file a Petition for Review of Agency Action in the United States District Court for the District of Hawaii, in **Littenberg v. Reich,** Civ. No. 93-00650 HMF. (Exhibit 21) The Petition states Smith was terminated because of Exhibit 8:

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> On May 22, 1992, Dr. Littenberg terminated Smith on grounds that his correspondence was defamatory and flagrantly insubordinate.

(Exhibit 21 at E-349)

22. Within a month of Smith's termination, Littenberg knew Smith had filed a worker's compensation claim for his back injury. (TR at 219-20)

23. Smith's termination devastated him and he felt "betrayed" by Littenberg and HMG, especially since he had been a loyal and dedicated employee for a number of years. He became "withdrawn" and had "difficulty sleeping." (TR at 85) He was "devastated by all of this." He also became depressed and required evaluation and counselling by Dr. Robert Marvit. (Exhibits 17 and 18) Dr. Marvit reported that Complainant was "depressed, obsessing, ruminating, and has post traumatic problems" (Exhibit 17 at E-307) and diagnosed him as suffering emotionally and psychologically from his termination:

> This is a young man who feels as if he was beaten up by a powerful authority who lied, cheated and misrepresented things to be vindictive to him as a whistle blower. His strong concerns about adherence to the rules and the protection of patients, have placed him in a precarious position and created somewhat of a reactive depression, anxiety syndrome. He currently is not having symptoms out of proportion with the reality context although, clearly, is clinically suffering from this condition.

(Exhibit 18 at E-326) None of his symptoms existed prior to his termination. (TR at 193-94) Dr. Marvit has concluded that Smith was in need of additional therapy over 18 to 24 months for his depression. (Exhibit 18 at E-326) Smith was billed ,250 for Dr. Marvit's services. (Exhibits 19 and 24)

24. The following consist of incorrect or exaggerated written or oral statements of Littenberg in HMG's and the NRC's files, to which Smith is entitled to abatement remedies:

a. Littenberg's letter of July 30, 1992, to the Nuclear Regulatory Commission (NRC) states that Smith's "[m]ultiple vacations, trips and both excused and unexcused absences had created significant interruptions in the Nuclear Medicine

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laboratory function." (Exhibit 3 at E-159) The record is clear that Smith did not regularly take vacations (for which he was paid by HMG) and was rarely out on sick leave or for any other reason. On cross-examination, Littenberg claimed Smith took vacations which were not recorded in the files. However, on May 15, 1992, just six days before Smith's termination, Littenberg informed Smith in writing that the audit of his vacation time proved he had 160 hours

accrued vacation. (Exhibit 1 at E-34) In his testimony, Littenberg could not say how many days vacation Smith took which were not reflected in his personnel file:

> Q. And you can't tell us how many days vacation Rick actually took that are not reflected in these records?
>
> A. You're right.

(TR at 240) He also could not say whether Smith took more vacation time than he was permitted under HMG rules:

> Q. Is it -- is it your belief, Dr. Littenberg, that Rick Smith took more vacation than he was entitled to take under the Medical Group policy and regulations?
>
> A. I don't know the answer to that question.

(TR at 245)

> Q. ... what you're saying is he may have taken more vacation than is reflected in the records, but less than he was entitled to take under Medical group policy. You just don't know?
>
> A. Yes, Sir.
>
> Q. Are you saying that Medical group improperly paid him for unused vacation time?
>
> A. That's not what I'm saying.

(TR at 246)

This Administrative Law Judge concludes that the record does not support Dr. Littenberg's testimony that Smith took multiple

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vacations and unexcused time off and, therefore, could not have caused significant disruptions in the nuclear medicine department. In fact, I conclude that Complainant was a loyal and dedicated employee, throughout his employment with Respondents.

b. The letter further states, "[T]emporary technologists on an emergency basis were often required." **Id.** Because of Smith's work history and lack of absences, temporary technologists on an emergency basis could not have been "often" required.

c. The letter further states, "Mr. Tajima's job description was developed conjointly by both Mr. Smith and myself."

Id. Smith did not participate in the development of the job description since he did not see the description until the NRC sent him materials sometime in the fall of 1992 after he was terminated.

d. The letter further states, "The records clearly state that David was performing the wipe test and instrument calibration with the exception of the gamma camera prior to the departure of Mr. Smith for a matter of many months." **Id.** at E-160. Complainant submits the statement is false because Tajima was not calibrating equipment since he was not qualified to perform and was incapable of performing that function.

e. The letter further states, "... Mr. Smith's 'alleged injury' led to his 'unexplained disappearance'...." Id. Smith was on workers' compensation from May 18, 1992, and had called HMG to inform them of his injury. Littenberg knew as of May 18 that Smith was out of work on disability and was receiving compensation benefits and did not have an "unexplained disappearance." Moreover, by the date of his letter, Littenberg had the completed workers' compensation report.

f. The letter further states, "On the dates noted, David Tajima continued doing his preassigned duties and continued imaging patients which he had been doing under Mr. Smith's tutelage for the prior eight months." **Id.** Tajima was not qualified or capable of performing the duties Littenberg states he was performing.

g. The letter further states, "This was the only job function that David Tajima had not done previously on his own." **Id.** This is not true.

h. Littenberg's letter of October 7, 1992, to the NRC states that Smith "actually abandoned his position on May 18

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and 19, 1992." Smith did not abandon his job and Littenberg knew it. (Exhibit 3 at E-156) Indeed, as of that time, Littenberg knew he had filed a workers' compensation claim for his injury. (TR at 229) Littenberg could not explain why he did not inform the NRC that Smith had a work injury:

> Q. When? When did you inform them in writing that Rick had incurred a work comp. injury?
>
> A. I don't know.
>
> *****
>
> Q. Well, I'll ask the question again.
>
> A. No, I did not write to them.

(TR at 230-31 and 232)

i. The letter further states, "[a]s I was preparing documents to Fed-Ex to Mr. Smith notifying him of his termination

for abandonment of his position and after hiring a new certified nuclear medicine technologist, I received Mr. Smith's letter, dated May 20, 1992." **Id.** Because Smith did not abandon his job, Littenberg could not have been preparing a letter to that effect, I find and conclude.

k. The letter further states, "... Mr. Smith, who participated in the formulation of the Nuclear Medicine Assistant job description ..." **Id.** Smith did not participate in the formation of the job description and, in fact, did not see the document until much later.

l. Littenberg's May 18 and 19, 1992 notes to the file are incorrect. (Exhibit 3 at E-185) Smith called in both days and Littenberg knew Smith was ill with a workers' compensation claim.

m. Littenberg's May 21, 1992, notes state, "David is only doing the same functions he has done in the past. Any lack of training is directly attributable to the dereliction of duty on the part of Mr. Smith. David is still calibrating equipment exactly as he has been doing in the past." (Exhibit 3 at E-186) Tajima had not been calibrating equipment. Based on Tajima's testimony, I find and conclude that he had virtually no understanding of the intricacies of calibration and the proper use of the dose calibrator, well counter and gamma camera. Further,

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Scott Dube, Radiological Safety Officer at Queen's Medical Center, admitted that he told Smith that Tajima had no business calibrating equipment and that he was over his head and doing things he should not have done at HMG:

> I might have said that if Rick had first told me things that -- that David were doing. And those things included injecting patients and stuff, then my reaction would be yes, he is over his head in response to what Rick may have described his function would be.

(TR at 121)

n. Littenberg's May 18, 1992, notes state, "Rick did not show up for work. He did not call me, his supervisor as clearly outlined in the Personnel policy." (Exhibit 3 at E-185) Smith called HMG that morning and advised Ms. Ferrer that he had suffered a work-related injury and would not be in to work. Moreover, Ferrer's recorded statement confirms that Smith called her on May 18th and that she told Littenberg Smith was out sick. (Exhibit 1 at E-141) A phone message in Smith's personnel file demonstrates that Littenberg had called the personnel department on May 18 to inform them that Smith was "out sick today" and to "make a note" of it. (Exhibit 1 at E-96) Littenberg's recorded statement further demonstrates he knew Smith had called Ferrer on May 18 to say he was out sick. (Exhibit 11 at E-240)

o. Littenberg's May 19, 1992, notes to file state

that he was considering terminating Smith for "abandonment of position." (Exhibit 3 at E-185) However, based on this closed record, I further find and conclude that Littenberg knew Smith had not abandoned his position, but rather knew he was out because of a work-related injury and was unable to work.

p. Littenberg's recorded statement to Industrial Indemnity states Smith's "job evaluations ... indicated in repetitive fashion, that he was antagonistic towards the rest of the staff, the rest of the staff was afraid to call him ..." (Exhibit 11 at E-241) In fact, Smith's only evaluations in evidence at Exhibit 3 at E-165-76) indicated that he "works well with others" (**id.** at E-165), "generally works well with staff and physicians" (**id.** at E-169) and "works well with others," (**id.** at E-173)

q. Littenberg's recorded statement further states, "Rick was out sick enough that ... the laboratory was placed in

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jeopardy ..." **Id.** In fact, Littenberg knew this was untrue.

r. Littenberg's recorded statement further states, "This time he just stopped showing up for work, he didn't contact me ..." (**Id.** at E-242) In fact, on May 18, 1992, Smith called Littenberg, through Ferrer, to inform them that he had suffered a work injury and was unable to work.

s. Sometime after Smith's termination, Littenberg repeated to Ferrer some hearsay that Smith was using illegal drugs, an allegation which was untrue and is not corroborated in any way. (TR at 207-208)

24. On February 18, 1994, Smith was offered reinstatement by HMG to his prior position effective March 7, 1994:

> Mr. Smith would perform essentially the same duties; however, there is no longer an assistant and to the extent that he has the time available, he would also be called upon to perform other related tasks as directed by the Director of Nursing who now supervises the nuclear medical technician. ... Mr. Smith would work a 40 hour schedule consisting of four week days, a half day Thursday mornings, and Saturday mornings from 8:00 a.m. to 12:00 p.m.

(Exhibit R-4)[4] Smith declined the offer because, as Littenberg admitted in his testimony, it was not an unconditional offer of reinstatement to the same position with the same terms and conditions he had before his termination:

> Q. With respect to your offer of reinstatement, you do agree that the offer contains terms and conditions that are different from the terms and conditions of

Rick's employment in May of 1992?

A. [Littenberg] Yes.

(TR at 350) The offered job was different from his prior job for the following reasons: first, Smith had never been supervised by the HMG Director of Nursing, a person who was not licensed or skilled in the field of nuclear medicine. (TR at 100, 138 and 141) Complainant testified that if he worked "under the supervision of the Director of Nursing," it would be "a safety issue because she had no training in nuclear medicine and she would be responsible

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for nuclear medicine and evaluating my work in nuclear medicine." (**Id.**) Smith had never worked for the Director of Nursing and previously made clear to Littenberg he would not work for the Director of Nursing. (Exhibit 3 at E-168) Smith also was never supervised by the Director of Nursing in non-safety, non-nuclear and non-radiological areas. (TR at 190) Although Littenberg claimed Smith's nuclear medicine work would continue to be supervised by Littenberg, that stipulation is not contained in the offer of reinstatement:

> Q. Alright. And when you got our reinstatement letter, didn't you assume that Dr. Littenberg would still clinically supervise you -- the formulas functions that have to be done by doctor of medicine?
>
> A. That's not what you said in your letter.

(TR at 142) Second, he was never given "other related tasks" by the director of nursing. Third, he was never required to work on Saturdays and, historically, Smith worked Mondays through Fridays, with the weekends off. (TR at 103-04) "[T]hat was one of the things that was attractive about" working at HMG. (**Id.**) Since his termination, he has had to work odd hours because that was the only work available to him and he needed to work. He preferred the working conditions at HMG to the conditions at his jobs since being terminated. (TR at 192-193)

25. At the time of his termination, Smith was earning at HMG $19.55/hour, $782/week, $3,388/month, or $40,664/year, not including fringe benefits. (TR at 105-06) If he had not been terminated, Smith would have earned from May 22, 1992 to August 1, 1993, approximately $49,004. While on Workers' Compensation for 62 weeks, from May 21, 1992 to July 26, 1993, Smith received $26,969.15, thus, Smith is entitled to lost wages of $49,004, less the workers' compensation he received. (**Id.**)

Based on the foregoing findings of fact, I find and conclude that Complainant has satisfied his burden of presenting a **prima facie** case. The overwhelming weight of the evidence proves that Respondents' sole motive for terminating Complainant was the fact that he had engaged in protected activity. The totality of this closed record leads to the conclusion that Complainant

reported these violations of the ERA to the Respondents and that these actions of the Complainant were the "motivating factor" in Respondents' decision to terminate him. **See Consolidated Edison**

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Co. v. Donovan, 673 F.2d 61, 62 (2d Cir. 1982).

ELEMENTS OF COMPLAINANT'S CASE

A. Engagement in Protected Activity

As already reported above, the District Director initially concluded that Respondents' termination of the Complainant violated the provisions of the ERA. That conclusion was not appealed by Respondents and the Secretary rejecting Judge Mahony's recommended decision, has concluded that Respondents waived their right to a hearing on the issue of liability when they "declined to seek a hearing within five days of receipt of the District Director's findings and order." Thus, Complainant has satisfied this aspect of his **prima facie** claim.

B. Respondents' Knowledge That Complainant WAS Engaged in Protected Activity

Likewise, this issue was resolved in complainant's favor by the District Director and reconsideration of this issue herein is foreclosed by the Secretary's mandate to the Office of Administrative Law Judges.

C. Adverse Actions, Including Discharge, Following Protected Activity

Complainant was treated differently than other employees following his notification of violations or concerned activity under the Act.

> "If an employer treats an employee differently after learning that the employee has engaged in protected activity, that difference in treatment is sufficient to establish a causal connection between the protected activity and the adverse personnel action." **Schlie and Grossman**, supra, citing **Smins v. Mme. Paulette Dry Cleaners**, 580 F.Supp. 593, [S.D.N.Y. 1984], see also **Capaci v. Katz & Besthoff, Inc.**, 525 F.Supp. 317 [E.D.La.1981] Aff'd. in part and reversed in part, 711 F.2d 647 [5th Cir. 1983], and other cases cited therein."

This issue was resolved in Complainant's favor by the District Director and reconsideration of this issue herein is foreclosed by the Secretary's mandate to the Office of Administrative Law Judges.

D. Temporal Relationship between the Protected Activity and the

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Termination

It is well-settled that temporal proximity is sufficient as a matter of law to establish the final required element of a **prima facie** case - that of causation of retaliatory discharge. **Keys v. Lutheran Family and Children's Services of Missouri,** 668 F.2d 356, 358 (8th Cir. 1980); **cert. denied,** 450 U.S. 979, 101 S.Ct 1513, 67 L.Ed 2nd 814 (1981); **Davis v. State University of New York,** 802 F.2d 638, 642 (2d Cir. 1986); **Mitchell v. Baldrich,**759 F.2d 80, 86 (D.C. Cir. 1985); **Dominic v. Consolidated Edison Co. of New York,** 822 F.2d 1249 (2d Cir. 1987) (considering retaliatory action claim for firing that occurred three months after filing complaint; **Burrows v. Chemed Corp.,** 567 F. Supp. 978, 986 (E.D. Mo. 1983) (holding inference of retaliatory motive justified, where transfer followed protected activity; **Kellin v. ACF Industries,** 671 F.2d 279 (8th Cir. 1982) (holding lower court's finding that **prima facie** case for retaliatory action was established, where EEOC charge was filed in late 1971 and disciplinary measures occurred throughout 1972).

The close proximity of time of the discharge to the protected activity will justify the inference of a retaliatory motive in the employer. **County v. Dole,** supra [8th Cir. 1989]. The above cases include temporal spacing between the protected activity and the retaliatory discharge of up to five months. **Thermidor, supra.**

In view of the foregoing, I find and conclude that the temporal relationship exists herein as the decision to terminate Complainant was made immediately after receipt of the letter in question. (CX 8)

E. DISCRIMINATORY DISCHARGE

I specifically reject the Respondents' position that Complainant was not terminated for engaging in protected activity (CX 10) but that he was unable to work because of his work-related injury.

I also reject the thesis that my decision herein, in effect, "second-guesses" the Respondents' business decisions. I do no such thing because my task is to determine whether the Respondents' actions were **bona fide** or were pre-textual. As I have already

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concluded, my review of the evidence leads to the logical inference that Complainant was terminated because of his protected activity and, thus, Respondents' reasons therefor are, in my judgment, pre-textual.

F. REMEDIES/DAMAGES

While Complainant has found gainful employment through his own efforts, he does seek reinstatement to his former position with Respondents. However, there is a serious question as to whether he can work harmoniously with Respondents. He specifically seeks an award of the lost back pay, any fringe benefits of which he has been deprived and compensatory damages as set forth above. **Shore v. Federal Express Co.**, 777 F.2d 1155 (6th Cir. 1985); **Davis v. Combustion Engineering Co.**, 742 F.2d 916, 922-23 (6th Cir. 1985).

It is now well-settled that the ERA requires "affirmative action to abate the violation." **42 USC §5851(b)(2)(B).** Under the statute and upon request, Complainant is entitled to an award of "costs and expenses (including attorney's fees and expert witness fees) reasonably incurred ... including compensatory damages." **42 USC §5851(b)(2)(B).** Moreover, the purpose of back pay is to make the employee whole, that is, to **restore the employee to the same position in which he or she would have been but for the discriminatory discharge.** Back pay awards should, therefore, be based on the earnings the employee would have received but for the discrimination. **Blackburn v. Metric Constructors, Inc.**, 86-ERA-4 (Sec'y Oct. 30, 1991). Further, interim earnings in replacement employment should be deducted from a back pay award. **Id.** In addition, prejudgment interest on back pay wages is permitted in whistleblower cases. Such interest is calculated in accordance with 29 CFR §20.58(a), at the rate specified in the Internal Revenue Code at 26 USC §6621. **Id.**

The award of back pay effectuates the remedial statutory purpose of making whole the victims of discrimination, and "unrealistic exactitude is not required" in calculating back pay and "uncertainties in determining what an employee would have earned but for the discrimination, should be resolved against the discriminating (party)." **EEOC v. Enterprise Ass'n Steamfitters Local No. 6348**, 542 F.2d 579, 587 (2d Cir. 1976), **cert. denied**, 430 U.S. 911 (1977), **quoting Hairston v. McLean Trucking Co.**, 520 F.2d 226, 233 (4th Cir. 1975). Initially, the Complainant bears the burden of establishing the amount of back pay that Respondents owe. **Adams v. Coastal Production Operation, Inc.**, 89-ERA-3 (Sec'y Aug. 5, 1992). Once the Complainant establishes the gross amount of back pay due, the burden shifts to the Respondents to prove facts

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which would mitigate that liability. **Lederhaus v. Donald Paschen & Midwest Inspection Service Ltd.**, 92-ERA-13 (Sec'y Oct. 26, 1992), slip. op. at 9-10; **Moody v. T.V.A.**, Dept of Labor Decisions, Vol. 7, No. 3, p. 68 (1993).

Regulations implementing the ERA should be read to give full redress for a violation of the employee protection provision because the ERA has a "broad, remedial purpose of protecting workers from retaliation based on their concerns for safety and quality." **Mackowiak v. University Nuclear Systems, Inc.,**

735 F.2d 1159, 1163 (9th Cir. 1984).

As indicated above, the statutory authorization authorizes the Court to award compensation including back pay; restoration of the terms, conditions and privileges of the prior employment; and compensatory damages to the Complainant.

The statute allows "abatement of discrimination, restoring an employee to his job with all attendant benefits including back pay, or compensatory damages, and an award of all reasonable expenses incurred in pursuit of the action." **Deford v. Secretary of Labor, supra** at 289. The use of compensatory damages in Section 5851 is intended to include not only such things as retirement benefits, but also medical expenses and other damages incurred in connection with physical ailments suffered by the employee resulting from the embarrassment and humiliation accompanying the discriminatory act. 79 ALJ Fed. 631, Section 6, **citing Deford v. Secretary of Labor, supra**, according to Complainant's thesis.

It is now well-settled that Complainant has a duty to mitigate damages by making a reasonable effort to Complainant find comparable employment. **See, e.g., Ford Motor Company v. EEOC**, 458 U.S. 291, 102 S.Ct. 3057 (1982).

Complainant also seeks an award of compensatory damages and "The measure of compensatory damages is such sum as will compensate the person injured for the loss sustained, with the least burden to the wrongdoer consistent with the idea of fair compensation." 25 **Corpus Juris Secundum**, Section 71. Compensatory damages may include general damages for mental anguish and for physical pain and suffering, and can include injury to reputation as a compensable psychic injury, which is a portion of the emotional distress damages and may include mental anguish, emotional strain and mental suffering. Nahmod, **Civil Rights and Civil Liberties Litigation, Section 4.03, "Compensatory Damages".** The Seventh Circuit has taken the approach, when awarding damages in wrongful discharge cases, to look at the range of awards previously made.

Fleming v. County of Kane, State of Illinois, 898 F.2d 553 (7th Cir. 1990).

Complainant's attorney also seeks approval of an attorney's fee as such fees are specifically authorized by the Act. The standards for determining what constitutes a reasonable attorney's fee should be drawn from decisions under Title VII and 42 U.S.C. Section 1988. **Modjeska Employment Discrimination Law, Second Edition, Section 519. See generally Bloom v. Stenson**, 465 U.S. 886, 79 L.Ed.2d 891, 104 S.Ct. 1514 (1984). "The general rule is that hours recently spent on successful claims and those sufficiently related thereto will be multiplied by a reasonable rate to produce the lodestar amount." **Modjeski, supra, citing Fite v. First Tennessee Production Credit Association**, 861 F.2d 887 (6th Cir. 1988). Upward allowances have been allowed where counsel had a contingency fee agreement and had worked in a small firm. **See Fite, supra; Wildman v. Lerner Storage Corp.**, 771

F.2d 605 (1st Cir. 1985). "The amount due counsel under contingent fee agreement does not impose a ceiling on the amount of attorney's fee the court may award." **See Modjeska, supra, citing Herold v. Hajoca Corp.**, 864 F.2d 317 (4th Cir. 1988).

It is well-settled that an aggrieved employee who proves a violation of the Act may be entitled to reinstatement together with a restoration of the terms, conditions and privileges of his employment, including back pay. **See** 42 U.S.C. § 5851(b)(2)(B). The employee is not, however, entitled to any newly created privileges of employment. **Deford v. Secretary of Labor**, 700 F.2d 281 (6th Cir. 1983). Also, Congress did not make punitive damages available to prevailing employees. **See English v. General Electric Co.**, 683 F. Supp. 1006 (E.D.N.C. 1988).

As is true in discrimination cases generally, as well as the common law of employment contracts, any award of back pay or other damages must be reduced by interim earnings or amounts earnable with reasonable diligence. **See, e.g.**, 42 U.S.C. § 2000e-5(g); **Nord v. United States Steel Corp.**, 758 F.2d 1462 (11th Cir. 1985) (interim earnings to be deducted from back pay award because plaintiff is not entitled to be made more than whole).

As noted above, Complainant became employed on August 1, 1993 and he does not seek any back pay after that date.

This Administrative Law Judge, in resolving Complainant's entitlement to compensatory damages and the extent thereof, is guided by certain well-settled principles in the area of compensatory damages law. Compensatory damages are awarded **to make**

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good or replace the loss caused by the wrong or injury and are confined to compensation. While the purpose of awarding compensatory damages is not to enable the injured or wronged party to make a profit on the transaction, compensatory damages involve the quantum of hurt to a plaintiff resulting from the injury or wrong. The general rule is that a wrongdoer is liable to the person injured in compensatory damages for all of the natural and direct or proximate consequences of his wrongful act or omission but he is not responsible for the remote consequences of his wrongful act or omission. Natural consequences are such as might reasonably have been foreseen, such as occur in an ordinary state of things. Thus, it is often said, if according to the usual experience of mankind the result was to be expected, it is not too remote.

An act or omission is the proximate cause of a loss where there is no intervening, independent, culpable and controlling cause severing the connection between the wrongful act or omission and the claimed loss. Thus, an intermediate cause which, disconnected from the primary act or omission, produces the injury or loss will be regarded as the proximate cause. It is sufficient if it is established that the defendant's act produced or set in motion other agencies, which in turn produced or contributed to the

final result. Moreover, although an act of the plaintiff may have intervened between defendant's wrong and the injury suffered, the defendant is not thereby excused if the intervening act was the result of or was naturally and reasonably induced by his earlier wrong. While the plaintiff is not entitled to recover damages for conditions which are due entirely to a previous disease, the defendant may be liable for damages if his wrongful act aggravated or exacerbated such disease or impairment of health. Thus, the wrongdoer is not exonerated from liability if, by reason of some pre-existing condition, his victim is more susceptible to injury and the plaintiff may recover such damages as proximately result from the activation or aggravation of a dormant disease or condition. Heart disease was recognized as a pre-existing condition in **Firkol v. A.R. Glen Corp.**, 223 F. Supp. 163 (D.C.N.J. 1963). As between an innocent and a wrongful cause, the law uniformly regards the latter as the proximate and legally responsible cause.

It is also well-settled that damages which are uncertain, contingent or speculative in their nature cannot be recovered as compensatory damages. Where a cause of action is complete and no subsequent action may be maintained, a recovery may be had for prospective and anticipated damages reasonably certain to accrue. Thus, damages are not restricted to the period ending with the

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institution of the suit and where it is established that there will be future effects sustained by the plaintiff as a result of the wrongful act or injury, damages for such effects may be awarded. The rule of "avoidable consequences," which is supplementary to the rule that a wrongdoer is responsible for the consequences of his misconduct, and is distinguishable from contributory negligence, imposes a duty on the injured person to minimize damages. Thus, no recovery may be had for losses which the injured person might have prevented by reasonable efforts and expenditures.

In general, one injured by another's wrong is entitled to compensation for all peculiar losses sustained and the burden of such losses falls on the party who occasioned it. Thus, it is generally declared that loss of earnings, wage, salary or other benefit is an element of damages which should be considered, provided that such earnings are not of a speculative or conjectural nature and that they are proved with reasonable certainty. Future earnings, or probable loss of earnings in the future, may be awarded if shown with reasonable certainty and are not speculative in character. Moreover, loss or impairment of earning capacity is a proper element of compensatory damages.

In the case at bar, Complainant sustained a work-related injury on May 15, 1992, was illegally discharged on May 22, 1992, and collected $26,969.15 in workers' compensation benefits for such injury. Complainant does not seek an award of back pay after August 1, 1993 as he has been gainfully employed since that date. It is well-settled that Complainant bears the burden of establishing the amount of back pay that Respondents owe herein. **Adams v. Coastal Production Operators, Inc.**, 89-

ERA-3 (Sec'y Aug. 5, 1992). Because back pay promotes the remedial statutory purpose of making whole the victims of discrimination, "unrealistic exactitude is not required" in calculating back pay, and "uncertainties in determining what an employee would have earned but for the discrimination, should be resolved against the discriminating (party)." **EEOC v. Enterprise Ass'n Steamfitters Local No. 638,** 542 F.2d 579, 587 (2d Cir. 1976), **cert. denied,** 430 U.S. 911 (1977), quoting **Hairston v. Clean Trucking Co.,** 520 F.2d 226, 233 (4TH Cir. 1975). **See NLRB v. Browne,** 890 F.2d 605, 608 (2d Cir. 1989) (once the plaintiff establishes the gross amount of back pay due, the burden shifts to the defendant to prove facts which would mitigate that liability). **Lederhaus v. Donald Paschen & Midwest Inspection Service, Ltd.,** 91-ERA-13 (Sec'y Oct. 26, 1992), **slip op.** at 9-10. It is also well-settled that interim earnings in replacement employment should be deducted from a back pay award. **Blackburn v. Metric Constructors, Inc.,** 86-ERA-4 (Sec'y Oct. 30, 1991).

The record reflects that Claimant's salary with the Respondents was $19.55 per hour and, but for the illegal and discriminatory discharge, would have earned from May 22, 1992 to August 1, 1993 the amount of $49,004.00. As Complainant received in workers' compensation benefits from May 21, 1992 through July 26, 1993 the amount of $26,969.15, Complainant is entitled to an award of $22,034.85. Respondents are entitled to a credit for the compensation benefits as such amount constitutes replacement income for his lost wages. Moreover, to deny Respondents this credit would result in double recovery for Complainant.

Complainant cites several cases in support of his thesis that Respondents are not entitled to a credit for the workers' compensation benefits he has received. However, those cases are clearly distinguishable as they relate to cases in which the defendants' actions caused the injury for which the benefits were received. In the instant case, Complainant received the benefits for the back injury he sustained while lifting a patient on May 15, 1992 and he was terminated on May 22, 1992. Thus, the workers' compensation benefits are not related to the discriminatory discharge but to a work-related back injury, and are, therefore, replacement income for his inability to return to work.

Attorney's Fees and Costs

Attorney Michael A. Lilly shall be awarded a fee for the thorough and professional manner in which he has successfully presented this claim. Such fee award is specifically permitted by the Act. Mr. Lilly has already filed a fee petition (CX 23) in the amount of $32,010.44 relating to those legal services rendered and costs incurred between August 19, 1992 and June 30, 1994. The fee was filed at the hearing as part of Complainant's exhibits and Respondents have interposed no objections thereon.

I have reviewed the fee petition and conclude that the fee petition as submitted is most reasonable and proper in view of the

thorough and professional manner in which Complainant's counsel has successfully prosecuted this matter, initially before the Secretary and herein before the Office of Administrative Law Judges.

Thus, Attorney Michael A. Lilly is awarded the requested fee.

Compensatory Damages

It is now well-settled that "the measure of compensatory damages is such sum as will compensate the person injured for the

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loss sustained, with the least burden to the wrongdoer consistent with the idea of fair compensation." **25 Corpus Juris Secundum**, Section 71. Compensatory damages may include general damages for mental anguish and for physical pain and suffering, and can include injury to reputation as a compensable psychic injury, which is a portion of the emotional distress damages and may include mental anguish, emotional strain and mental suffering. Nahmod, **Civil Rights and Civil Liberties Litigation**, Section 4.03, "Compensatory Damages." The Court of Appeals for the Seventh Circuit has taken the approach, when awarding damages in wrongful discharge cases, to look at the range of awards previously made. **Fleming v. County of Kane, State of Illinois**, 898 F.2d 553 (7th Cir. 1990). In **Fleming**, the Court approved $40,000.00 as within the range for the emotional distress arising from the discriminatory discharge.

In **Fleming**, the final damage award, in the amount of $157,574.19, was comprised of the following elements: $87,283.99 for lost, past and future earnings; $30,290.20 as compensation for Fleming's premature withdrawal from his annuity; and $40,000.00 for emotional distress, reduced from $120,000 by the $80,000 remittitur. The Court approved the award of $40,000 for Fleming's emotional distress as the "record in (that) case does show a rational connection between the evidence and the damage award," the Court noting that the jury accepted Fleming's testimony "describing (his) humiliation at being subjected to defendants' adopted course of 'progressive discipline'," his "embarrassment and humiliation at being reprimanded in front of his fellow employees, some of whom he had worked with for many years," the "depression he suffered during the period in question, as well as to serious headaches and sleeplessness," as well as his doctor's testimony "that the job stress which Fleming experienced during this period may have resulted in an aggravation of his physical condition." **Fleming, supra** at 562.

Moreover, that Court's "review of those cases (wherein damages for emotional stress are sought) led us to the conclusion that damage awards in this context have ranged from 500 to over $40,000. Mr. Fleming was awarded $40,000 for emotional distress. Although this award falls within the upper limits of that range, we do not conclude that it is out of line with other cases in similar contexts. **See, e.g., Ramsey v. American Air Filter Co., Inc.**, 772 F.2d 1303, 1313 (7th Cir. 1985) ($35,000 was determined to be outermost award that could be supported by the record in §1981 race discrimination case)." **Fleming,**

supra at 562.

Section 5851 of the ERA permits the award of compensatory damages. Emotional/mental distress damages are compensatory

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damages. **Damages**, 22 Am. Jr. 2d § 259. Black's Law Dictionary also defines actual damages as "synonymous with 'compensatory damages' and with 'general damages.'" **Id** at 352. The rationale is that compensatory damages are damages which compensate a person for injuries incurred as a result of defendant's wrongful conduct. Accordingly, compensatory damages include damages for emotional distress:

> It is not necessary to determine that the Zoo's conduct was outrageous in order to award Ms. Haynes compensatory damages for emotional distress, because the emotional injury is a direct result of the Zoo's tortious conduct, not an independent tort.

Haynes v. Zoological Society of Cincinnati, 567 N.E.2d 1048, 1051 (Ohio 1990). Numerous other cases, including civil rights cases have similarly held that "[d]amages for emotional distress or mental suffering or humiliation are compensatory ..." **Amos v. Prom**, 115 F. Supp. 127, 132 (N.D. Iowas 1953) **See White v. A.D.M. Milling Co.**, 93 F.R.D. 872, 874 (W.D. Mo. 1982) ("[c]ompensatory damages under 42 U.S.C. § 1983 may include in an appropriate case mental and emotional distress. [Citing **Carey v. Piphus**, 435 US 247 (1978).] Likewise, compensatory damages for mental distress are an appropriate remedy under § 1981."); **Ruhlman v. Hakinson**, 461 F. Supp. 145, 151 (W.D. Pa. 1978) ("Compensatory damages for emotional distress are recoverable in a civil rights action. **Filasky v. Preferred Risk Mut. Ins. Co.**, 734 P.2d 76, 83 (Ariz. 1987) ("the record fully justifies the jury's award of $100,000 in compensatory damages for emotional distress and attorneys' fees."); **Alabama Power Company v. Mosley**, 318 So.2d 260, 266 (Ala. 1975)("There is no fixed standard for ascertainment of compensatory damages recoverable here for physical pain and mental suffering, but the amount of such award is left to the sound discretion of the jury, subject only to correction by the court for clear abuse or passionate exercise of that discretion. **Campbell v. Animal Quarantine Station**, 63 Haw. 557 (1981)("Such damages may include reasonable compensation for emotional distress .."); **Hawaii Federal Asbestos Cases**, 734 F. Supp. 1563 (D. Haw. 1990)(mental anguish is compensable as general damages); **Gorab v. Equity General Agents, Inc.**, 661 P.2d 1196, 1199 (Colo. App. 1983) (injured person "may be entitled to compensatory damages, including damages for emotional distress ..."); and **Farmers Home Mut. Ins. Co. v. Fiscus**, 725 P.2d 234, 236 (Nev. 1986)(court upheld award of "mental and emotional distress damages" as "compensatory damages"). Therefore, as a measure of compensatory damages, Smith is entitled to a recommended award of emotional/mental distress damages in an amount determined

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in the discretion of this Administrative Law Judge.

Complainant suggests that this Administrative Law Judge use the per diem system as a method of quantifying damages for pain and suffering based on a mathematical formula. **1 Jerome H. Nates et al., Damages in Tort Actions**, § 4.70 at 4-262 (1994). The propriety of the per diem thesis "turns on the court's confidence in the ability of the juror to parse the testimony and determine for himself what is true or untrue, exaggerated or reasonable with respect to damages for pain and suffering." **Barretto v. Akau**, ____ Haw., _____, 463 P.2d 917, 923 (1969). Accordingly, using the minimum wage on a per diem basis may be an acceptable method of calculating emotional/mental distress damages according to Complainant.

I cannot accept Complainant's per diem thesis as that would greatly exaggerate the mental stress sustained by Complainant and would greatly differ from comparable awards in this area.

In view of the foregoing precedents, and based upon the totality of this closed record, including Dr. Marvit's medical reports, and my observation of Complainant's demeanor, I hereby award Complainant the additional amount of $10,000.00 as compensatory damages for the emotional pain, mental anguish and the emotional stress he has experienced herein, as well as the damage to his reputation in the nuclear power industry, an industry which requires impeccable personal credentials.

Complainant is also entitled to an award of future psychiatric counselling with Robert C. Marvit, M.D., as I find and conclude that such counselling, as recommended by Dr. Marvit, in his April 25, 1994 **Supplemental Complex Medical Evaluation** (CX 18), is most reasonable, necessary and appropriate to restore Complainant to the **status quo ante** he enjoyed prior to his discriminatory discharge on May 22, 1992. Dr. Marvit has estimated that such therapy over the next eighteen to twenty-four months shall cost about $10,000.00

Thus, Complainant is entitled to an award of such medical benefits, as well as payment of Dr. Marvit's outstanding medical bill in the amount of ,250.00. (CX 19)

RECOMMENDED ORDER

Accordingly, I find and conclude that Complainant is entitled to the following specific relief under the Act because adverse action was taken by Respondents with respect to Complainant's employment status in violation of the Act.

CONCLUSION

For the reasons set forth above, this Court finds that (1) Complainant was discharged from his employment with Respondents and that he was the subject of adverse employment action, (2)

Complainant has established that he was engaged in protected activity under the Act, (3) Complainant established a **prima facie** case of retaliatory discharge by Respondents and (4) Respondents' witnesses were, in certain material respects, less that candid to such an extent that I have credited Complainant's version in those areas of inconsistencies.

REMEDY

As Complainant seeks reinstatement with the Respondent, he shall be immediately reinstated by the Respondents to his former position. He is entitled to the specific damages awarded herein plus appropriate interest, commencing on May 22, 1992 and continuing until such time as Respondents pay the amount of the award to Complainant. Appropriate interest shall be paid on the award in accordance with 26 U.S.C. §6621. **Park v. McLean Transportation Services, Inc.**, 91-STA-47 (Sec'y June 15, 1992).

Respondents submit that Complainant is not entitled to reinstatement as he rejected the Respondents' offer of reinstatement made by letter dated February 18, 1993 (sic). In said letter Respondents' counsel advised Complainant's attorney as follows (RX 4):

"On behalf of our clients, Richard L. Littenberg, M.D. and Honolulu Medical Group, this is an unconditional offer of reinstatement to your client, Richard Smith, to return to work at HMG in his former position as a nuclear medical technician effective March 7, 1994. This offer is made without prejudice to either party's position in the pending administrative or civil proceedings.

"Mr. Smith will be reinstated to his former position at his former rate of pay with all attendant benefits. Mr. Smith would perform essentially the same duties; however, there is no longer an assistant and to the extent that he has the time available, he would also be called upon to perform other related tasks as directed by the Director of Nursing who now supervises the nuclear

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medical technician. To the extent that he requires assistance in any physical tasks, it will be provided to him upon request. Mr. Smith would work a 40 hour schedule consisting of four week days, a half day Thursday mornings, and Saturday mornings from 8:00 a.m. to 12:00 p.m. This is also consistent with the schedule now worked by the incumbent nuclear medical technician.

"This offer is made in accordance with the Supreme Court's decision in **Ford Motor Company v. EEOC**, 458 U.S. 219 (1982). If you do not believe that this is a bona fide unconditional offer of reinstatement or if you have any questions about it, please let me know immediately. Otherwise, please provide me with Mr. Smith's response no later than March 3, 1994."

However, Complainant rejected the reinstatement offer for the following reasons:

Initially, Complainant submits that **there was no unconditional offer of reinstatement.** An offer of reinstatement does not constitute an unconditional offer if it is demeaning ("the unemployed or underemployed claimant need not go into another line of work, accept a demotion or take a demeaning position . . ." **Ford Motor Company, supra** at 231) or had different conditions of employment and benefits (**Good Foods Manufacturing & Processing Corp,** 195 NLRB 418, 419 (1972) (cited with approval by **Ford, supra** at 231 n.16).

The job offered by Respondents was demeaning and had different conditions of employment and benefits in the following respects, according to Complainant.

At all times during Complainant's employment, he was directly supervised by Dr. Littenberg, a licensed nuclear medicine physician. The offered job would have had Complainant working for the Director of Nursing who was NOT licensed in nuclear medicine. Complaint had never worked for a Director of Nursing. In fact, his predecessor at Honolulu Medical Group worked for the Director of Nursing, a situation which turned out to be a problem for the predecessor because the Director lacked knowledge of nuclear medicine and yet would evaluate him on his nuclear medicine skills. The Director did not understand what he was doing, such as following nuclear regulatory guidelines, radiation safety, equipment calibration, ordering radio pharmaceuticals and administering radio pharmaceuticals. It was for that reason the Complainant specifically required as a condition of employment that he not work for the Director of Nursing, but rather for Dr. Littenberg personally. Unless Complainant was supervised directly

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by Dr. Littenberg, any job offer would not be unconditional and would constitute a substantial alteration of the working relationship and possibly compromise the safety of patients, according to Complainant, who also pointed out that the offered job also required work on Saturdays, which was never required before. Historically, Complainant worked Mondays through Fridays, with the weekends off.

In view of the foregoing, I find and conclude that Complainant is entitled to immediate reinstatement herein as Respondents' job offer was not unconditional as it would have not returned him to his previous job, together with the benefits and privileges he formerly enjoyed, due to the different and charged conditions of the proferred employment.

Thus, Complainant is entitled to immediate reinstatement at his former position at HMG, together with all of the benefits and privileges he formerly enjoyed.

Complainant has sustained his burden of mitigating damages as he accepted the first offer of permanent employment made to him by the **Castle Medical Center on August 1, 1993.**

Accordingly, Complainant is entitled to an award of damages, back pay and compensatory damages in the amount of $43,284.85, as specifically discussed and awarded above, from May 22, 1992 to the date of actual payment, including appropriate interest thereon.

Complainant is also entitled to a provision herein directing that Respondents immediately expunge from Complainant's personnel records all derogatory or negative information contained therein relating to Complainant's work for the Respondents and his termination on September 10, 1992. Respondents shall also provide neutral employment references when inquiry is made about Complainant by another firm, or entity or organization or individual.

ORDER[5]

It is therefore **ORDERED** that Respondents shall pay to Complainant the amount of $43,284.85, as further identified below, commencing on May 22, 1992 and continuing until payment of the award by Respondents, plus appropriate interest at the IRS rate, computed until the date of payment to Complainant.

It is further **ORDERED** that Respondents shall immediately

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expunge from Complainant's personnel records all derogatory or negative information contained therein relating to Complainant's employment with the Respondents and his termination on May 22, 1992. Respondents shall also provide neutral employment references when inquiry is made about Complainant by another firm, entity, organization or an individual.

It is further **ORDERED** that Respondents shall pay to Michael A. Lilly a reasonable fee in the amount of $32,010.44 for representing Complainant between August 19, 1992 and June 30, 1994.

It is therefore **ordered** that:

1. Smith shall be immediately reinstated at his position with HMG with the same terms and conditions he enjoyed before his termination.

2. Respondents shall pay Smith the following compensatory damages:

    a. Lost wages of $22,034.85.
    b. Emotional distress damages of $10,000.00
    c. Dr. Marvit's bill of ,250.
    d. Future medical treatment costs of $10,000.00

3. Respondents shall purge from their records all references to Smith's termination, including but not limited to:

    a. Littenberg's May 18 and 19, 1992 notes to file.

Exhibit 3 at E-185.

b. Littenberg's May 21, 1992 notes to file. Exhibit 3 at E-186.

4. Littenberg is instructed to inform the NRC in writing of the following:

a. That his letter of July 30, 1992 incorrectly stated Smith's "[m]ultiple vacations, trips and both excused and unexcused absences had created significant interruptions in the Nuclear Medicine laboratory function." Exhibit 3 at E-159. Littenberg shall inform the NRC that Smith did not regularly take vacations (for which he was paid by HMG) and was rarely out on sick leave or for any other reason.

b. That his letter of July 30, 1992 further incorrectly stated "[t]emporary technologists on an

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emergency basis were often required." **Id.** Littenberg shall inform the NRC that because of Smith's work history and lack of absences, temporary technologists on an emergency basis were not "often" required.

c. That his letter of July 30, 1992 further incorrectly stated, "Mr. Tajima's job description was developed conjointly by both Mr. smith and myself." **Id.** Littenberg shall inform the NRC that Smith did not develop the job description since he did not see the description until he was sent some materials sometime in the fall of 1992 after he was terminated.

d. That his letter of July 30, 1992 further incorrectly stated, "The records clearly state that David was performing the wipe test and instrument calibration with the exception of the gamma camera prior to the departure of Mr. Smith for a matter of many months." **Id.** at E-160. Littenberg shall inform the NRC that Tajima was not calibrating equipment since he was not qualified to perform and was incapable of performing that function.

e. That his letter of July 30, 1992 further incorrectly stated, "... Mr. Smith's 'alleged injury' led to his 'unexplained disappearance' ..." **Id.** Littenberg shall inform the NRC that Smith was on workers' compensation from May 18, 1992, and had called HMG to inform them of his injury and that Littenberg knew as of May 18th that Smith was on workers' compensation.

f. That his letter of July 30, 1992 further incorrectly stated, "On the dates noted, David Tajima continued doing his preassigned duties and continued

imaging patients which he had been doing under Mr. Smith's tutelage for the prior eight months." **Id.** Littenberg shall inform the NRC that Tajima was not qualified or capable of performing the duties Littenberg states he was performing.

g. That his letter of July 30, 1992 further incorrectly stated, "This was the only job function that David Tajima had not done previously on his own." **Id.** Littenberg shall inform the NRC that this was not true.

h. That his letter of October 7, 1992 to the NRC incorrectly stated that Smith "actually abandoned his position on May 18 and 19, 1992." Littenberg shall inform the NRC that Smith did not abandon his job and

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Littenberg knew it. Exhibit 3 at E-156.

i. That his letter of October 7, 1992 further incorrectly stated, "[a]s I was preparing documents to FedEx to Mr. Smith notifying him of his termination for abandonment of his position and after hiring a new certified nuclear medicine technologist, I received Mr. Smith's letter, dated May 20, 1992." **Id.** Littenberg shall inform the NRC that, because Smith did not abandon his job, Littenberg was not preparing a letter to that effect.

k. That his letter of October 7, 1992 further incorrectly stated, "... Mr. Smith, who participated in the formulation of the Nuclear Medicine Assistant job description ..." **Id.** Littenberg shall inform the NRC that Smith did not participate in the formation of the job description.

l. That his May 18 and 19, 1992 notes to file, which he sent to the NRC, were incorrect. Exhibit 3 at E-185. Littenberg is instructed to inform the NRC that Smith called in both days and Littenberg knew Smith was ill with a workers' compensation claim.

m. That his May 21, 1992 notes to file, which he sent to the NRC, incorrectly stated, "David is only doing the same functions he has done in the past. Any lack of training is directly attributable to the dereliction of duty on the part of Mr. Smith. David is still calibrating equipment exactly as he has been doing in the past." Exhibit 3 at E-186. Littenberg is instructed to inform the NRC that Tajima had not been calibrating equipment.

n. That his May 18, 1992 notes to file, which he sent to the NRC, incorrectly stated, "Rick did not show up for work. He did not call me, his supervisor as clearly outlined in the Personnel policy." Exhibit 3 at

E-185. Littenberg is instructed to inform the NRC that Smith in fact did call HMG that morning and left word he had suffered a work related injury and would not be in to work.

o. That his May 19, 1992 notes to file, which he sent to the NRC, incorrectly stated that he was considering terminating Smith for "abandonment of

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position." Exhibit 3 at E-185. Littenberg is instructed to inform the NRC that he knew Smith had not abandoned his position, but rather knew he was on a work related injury.

5. Littenberg shall inform Industrial Indemnity of the following:

a. That Littenberg's recorded statement incorrectly stated, "Smith has a history of being out from work on a ... regular basis." Exhibit 11 at E-240. Littenberg is instructed to inform Industrial Indemnity that smith had a history of not taking vacations for which he was paid.

b. That Littenberg's recorded statement further incorrectly stated, "job evaluations ... indicated a repetitive fashion, that he was antagonistic towards the rest of the staff ..." **Id.** at E-241. Littenberg shall inform Industrial Indemnity that Smith's job evaluations demonstrated that he worked well with others.

c. That Littenberg's recorded statement further incorrectly stated, "Rick was out sick enough that ... the laboratory was placed in jeopardy ..." **Id.** Littenberg shall inform Industrial Indemnity that Smith was rarely out sick and therefore could not have placed the laboratory in jeopardy.

d. That Littenberg's recorded statement further incorrectly stated, "This time he just stopped showing up for work, he didn't contact me ..." **Id.** at E-242. Littenberg is instructed to inform Industrial Indemnity that Smith did not just stop showing up, that he had contacted Littenberg through Ferrer and that Littenberg knew he had suffered a work injury.

DAVID W. DI NARDI

ADMINISTRATIVE LAW JUDGE

Dated:
Boston, Massachusetts

DWD:gcb

[ENDNOTES]

[1] The following abbreviation shall be used herein: "ALJ"-Administrative Law Judge Exhibits, "CX"-Complainant Exhibits, "DX"-Administrator Exhibits, "EX"-Respondent Exhibits, "TR"-Transcript.

[2] Respondent waived its right to a hearing on the issue of liability when it declined to seek a hearing within five days of receipt of the District Director's findings and order.

[3] There is a dispute regarding whether or not purely internal complaints to management constitute protected activity, however, the Secretary of Labor has issued decisions which find that an employee is protected when engaging in this particular activity. **See** S. KOHN, THE WHISTLEBLOWER LITIGATION HANDBOOK 37, 43 (1990); **compare Kansas Gas & Elec. Co. v. Brock**, 780 F.2d 1505 (10th Cir. 1985), *cert. denied*, 478 U.S. 1011 (1986) (court upheld Secretary of Labor's position that employee protection provision of Energy Reorganization Act protects purely internal complaints) with **Brown & Root, Inc. v. Donovan**, 747 F.2d 1029 (5th Cir. 1984) (court held that quality control inspector's internal filing of intracorporate complaint was not protected activity).

[4] Exhibit R-4 is incorrectly dated February 18, **1993**; it in fact was dated 1994.

[5] The Final Order shall be issued by the Secretary of Labor.